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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FRANK SNEDECOR, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and LOS ANGELES COMMUNITY COLLEGE DISTRICT, Respondents.	No. B209686 (W.C.A.B. No. MON 0307421)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Annulled and remanded.

Gordon, Edelstein, Krepack, Grant, Felton & Goldstein and Adam Dombchik for Petitioner.

No appearance for Respondent Workers' Compensation Appeals Board.

Bredfeldt, Corson & Odukoya and John D. Bredfeldt for Respondent Los Angeles Community College District.

Petitioner, Frank Snedecor, who injured his cervical spine while working for respondent, Los Angeles Community College District, contends that the Workers' Compensation Appeals Board (WCAB) should have applied the Schedule For Rating Permanent Disabilities (schedule) in effect prior to the schedule effective January 1, 2005. The WCAB found that there was no comprehensive medical-legal or treating physician's report "indicating the existing of permanent disability" prior to January 1, 2005,[1] and the 2005 schedule applied. We conclude that substantial evidence considering the entire record does not support the WCAB's findings. Therefore, we annul the WCAB's decision and remand the matter to determine the applicable schedule based on this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Snedecor's industrial injury and treatment.*

Frank Snedecor, a plumber for the Los Angeles Community College District (District), injured his cervical spine at work on February 20, 2003. On February 3, 2004, orthopedic surgeon, Michael Schiffman, M.D., performed cervical discectomy and fusion at C5-6 and C6-7, which required grafts and internal fixation of an anterior plate with four 14 millimeter screws. Thereafter, Dr. Schiffman issued reports that Snedecor's

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[1] Labor Code section 4660, subdivision (d) (4660(d)) provides: "The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker."

All further reference to statute is to the Labor Code unless stated otherwise.

condition was improving with treatment and medications and he was temporarily totally disabled.

In a report dated September 30, 2004, Dr. Schiffman indicated that the fusion was progressing but Snedecor had various subjective complaints, was temporarily totally disabled and required further medication. Dr. Schiffman's report also noted "computer Rom this o.v." The computer range of motion testing for the cervical spine was reported separately on September 30, 2004, which also suggested an 18 percent whole person impairment under the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Guides), 4th edition.

In a report dated November 9, 2005, Dr. Schiffman indicated that Snedecor's condition had reached maximum medical improvement and he was permanent and stationary. Objective factors of disability included surgical residuals, limited motion, local tenderness and spasm, atrophy of the right biceps, and grip weakness of the right dominant hand. Work capacity limitations or restrictions included no lifting more than 10 pounds, forceful pushing and pulling, prolonged periods of upright cervical support and cervical motion extremes. Dr. Schiffman concluded that Snedecor's whole person impairment was 28 percent based on "alteration of motion segment integrity secondary to surgical fusion" under DRE (Diagnosis Related Estimates) cervical category IV of the AMA Guides. Dr. Schiffman also concluded that Snedecor was a qualified injured worker eligible for vocational rehabilitation.

2. *Proceedings Before the WCAB*.

The parties proceeded to trial and the issues included whether the 2005 or prior schedule applied. Snedecor testified regarding his injury, treatment and disability.

The workers' compensation administrative law judge (WCJ) determined that Snedecor's industrial injury resulted in 65 percent permanent disability under the schedule effective for injuries on and after April 1, 1997 (1997 schedule). In the opinion on decision, the WCJ explained that the award of permanent disability was based on Snedecor's credible testimony and Dr. Schiffman's opinion. Application of the 1997

schedule was based on the cervical fusion, medical reporting and *Genlyte Group, LLC v. Workers' Comp. Appeals Bd.* (2008) 158 Cal.App.4th 705, 716 (*Genlyte*) (comprehensive medical-legal or treating physician report and record may indicate existence of permanent disability under section 4660(d) even if injured worker not permanent and stationary).

The District petitioned the WCAB for reconsideration and contended that the WCJ incorrectly applied the 1997 schedule under section 4660(d) and *Genlyte* because the record does not contain any medical reports "indicating the existence of permanent disability" prior to January 1, 2005.

In the report on reconsideration, the WCJ noted that the 1997 schedule states that spinal injury permanent disability is measured mainly by limitations of motions. The WCJ explained that Dr. Schiffman's reports incorporated the reports of computer range of motion testing, which reported limited range of cervical motion and a 17 percent whole person impairment under the 4th edition of the AMA Guides. The WCJ reasoned that, "Notwithstanding, this is not AMA Guides case nor is it referring to the 5th Edition, it nonetheless indicates the existence of permanent disability prior to 1/1/05. This alone, renders the rating to be done under the 1997 PDRS. [¶] However, on December 20, 2004, defendants also sent a NOPE letter indicating an offer of vocational rehabilitation to the applicant. A change of occupation under the 1997 PDRS is a 20 standard. Again, this would support an existence of permanent disability. . . . [¶] . . . [¶] Lastly, the applicant in undergoing a fusion documents PD prior to 2004 in that under the definition of permanent disability as defined in *Genlyte*, *infra*, the 1997 PDRS and the AMA Guides the fusion alone supports a finding of permanent disability prior to 1/1/05."

The WCAB granted the District reconsideration, reversed the WCJ's finding of permanent disability based on the 1997 schedule, and remanded the matter for a finding of permanent disability under the 2005 schedule. The WCAB concluded that none of the reasons reported by the WCJ for reconsideration overcame the lack of a medical report prior to January 1, 2005, "indicating the existence of permanent disability" under section 4660(d) and case law. The WCAB explained that, "It is not within the WCJ's authority

to find an indication of the existence of permanent disability from diagnostic reports, absent medical opinion in a comprehensive medical-legal or treating physician's report. Further, defendant's duty to provide applicant with the NOPE letter was not triggered by a medical finding that applicant was a qualified injured worker, but by the fact that he had been out of work for the requisite period of time. A presumption of QIW status on that basis is not the equivalent of substantial medical evidence indicating the existence of permanent disability."

3. *Snedecor's Petition for Writ of Review and Contentions*.

Snedecor petitions for writ of review and contends that the 1997 schedule applies because Dr. Schiffman's 2004 treating physician's reports incorporated the computer range of motion testing reports, which indicated the existence of permanent disability under section 4660(d). Snedecor argues that the WCAB is mistaken that section 4660(d) requires Dr. Schiffman to expressly state that permanent disability exists, and the entire record should have been considered under *Genlyte*. Snedecor also argues that while the medical reports indicate Snedecor's cervical fusion improved over time, range of motion was always limited and the cervical spine was irreversibly impaired due to the stabilizing plates attached by screws at C5-6 and C6-7. As the WCJ pointed out, limited range of motion is a measurement of spinal injury permanent disability under the 1997 schedule.

Snedecor contends further that the reported whole person impairment under the AMA Guides indicated the existence of permanent disability under the 1997 schedule, as found by the WCJ. Snedecor argues that on page 392 of the AMA Guides, spinal fusion that results in alteration of motion segment integrity at the fused level is whole person impairment which is permanent.

4. *The District's Answer*.

The District answers that Dr. Schiffman's 2004 reports did not indicate the existence of permanent disability as required under section 4660(d), nor that permanent disability or vocational rehabilitation was even likely. In *Genlyte* at page 710 and *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2008) 159 Cal.App.4th 483, 488 (*Zenith*), the

court indicated that the treating physicians actually stated permanent disability existed or was likely in a 2004 report. The District argues that Snedecor and the WCJ rely on diagnostic reports, which would be an exception to the express language in section 4660(d). In addition, the reported ranges of cervical motion varied greatly indicating the condition was not permanent, and whole person impairment due to cervical fusion under the AMA Guides pertains solely to the 2005 schedule.

DISCUSSION

1. *Standard of Review*.

A decision by the WCAB that is based on factual findings which are supported by substantial evidence is normally affirmed by the reviewing court. (§ 5952; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 637 (*LeVesque*); *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233 (*Western Growers*).) Substantial evidence generally means evidence that is credible, reasonable, and of solid value, which a reasonable mind might accept as probative on the issues and adequate to support a conclusion. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164 (*Braewood*).) A factual finding, order, decision or award is not based on substantial evidence if unreasonable, illogical, arbitrary, improbable, or inequitable considering the entire record and statutory scheme. (*Western Growers, supra,* 16 Cal.App.4th at p. 233; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 254.) The reviewing court also may not isolate facts which support or disapprove of the WCAB's conclusions and ignore facts which rebut or explain the supporting evidence, but must examine the entire record. (*Braewood, supra,* 34 Cal.3d at p. 164; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 (*Garza*); *LeVesque, supra,* 1 Cal.3d at pp. 637-638.) Similarly, the reviewing court may not reweigh evidence or decide disputed facts. (*Western Growers, supra,* 16 Cal.App.4th at p. 233.)

2. *Rules of Statutory Construction*.

Interpretation of governing statutes or application of the law to undisputed facts is decided de novo by the reviewing court, even though the WCAB's interpretation is entitled to great weight unless clearly erroneous. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1331 (*Brodie*); *Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 828 (*Ralphs Grocery Co*).) The Legislature's intent should be determined and given effect by the reviewing court. (*Brodie, supra*, 40 Cal.4th at p. 1324; *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 (*DuBois*); *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 (*Moyer*).) The Legislature's intent is generally determined from the plain meaning of the statutory language, unless the language or intent is uncertain or ambiguous. (*DuBois, supra,* 5 Cal.4th at pp. 387-388; *Moyer, supra,* 10 Cal.3d at p. 230.) Interpretation of the statutory language should be consistent and harmonized with the purpose of the statute and the statutory framework as a whole. (*Brodie, supra,* 40 Cal.4th at p. 1328; *DuBois, supra*, 5 Cal.4th at p. 388; *Moyer, supra*, 10 Cal.3d at p. 230.) When statutory language or the Legislature's intent is uncertain or ambiguous, rules of construction, legislative history or historical use may determine meaning or intent. (*DuBois, supra,* 5 Cal.4th at pp. 387-388, 393.)

The reviewing court is also obligated to liberally construe workers' compensation under section 3202.[2] However, liberal construction under "Section 3202 is a tool for resolving statutory ambiguity where it is not possible through other means to discern the Legislature's actual intent." (*Brodie, supra*, 40 Cal.4th at p. 1332.)

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[2] Section 3202 provides: "This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

3. *Permanent Disability Indemnity Payments.*

One of the primary benefits provided by workers' compensation to employees injured at work is payment of indemnity for permanent disability caused by industrial injury. (*Brodie, supra,* 40 Cal.4th at p. 1320 (repeal of section 4750 did not change subtraction of prior injury or non-industrial permanent disability percentage from permanent disability percentage after industrial injury under *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1).) Historically, permanent disability has not been defined by statute. (*Genlyte, supra,* 158 Cal.App.4th at pp. 719-720; *Luchini v. Workmen's Comp. App. Bd.* (1970) 7 Cal.App.3d 141, 144 (*Luchini*).) Courts have defined permanent disability as the "irreversible residual of an injury,"[3] "impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market,"[4] or a prophylactic work restriction to prevent further injury.[5] For more serious injuries such as insidious and progressive disease, severe burn or the loss of sight or limb, permanent disability may exist even before the injured worker's condition is permanent and stationary.[6] (*Lewis v. Workers' Comp. Appeals Bd.* (2008) 168 Cal.App.4th 696, 698, 700 (*Lewis*); *Zenith, supra,* 159 Cal.App.4th at pp. 496-499; *Genlyte, supra,* 158 Cal.App.4th at pp. 720-722.) Permanent disability indemnity payments are intended to compensate an industrial injured worker for physical loss and diminished future earning capacity. (§ 4660(a); *Brodie, supra,* 40 Cal.4th at p. 1320.)

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3 *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114-1116 (employer has burden to prove apportionment including overlap of disabilities from separate injuries under § 4664).

4 *Brodie, supra,* 40 Cal.4th at page 1320; *State Compensation Ins. Fund v. Industrial Acc. Com.* (1963) 59 Cal.2d 45, 52 (subsequent injury with overlapping permanent disability to different body parts compensable to extent alters earning capacity or ability to compete in labor market); *Zenith, supra,* 159 Cal.App.4th at page 497.

5 *Luchini, supra,* 7 Cal.App.3d at pages 142-143, 145-146.

6 ""Permanent and stationary status" is the point when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment." (Cal. Code Regs., tit. 8, § 9785, subd. (a)(8).)

Permanent disability indemnity payments are generally calculated by determining the percentage of permanent disability and converting that percentage into a monetary amount based on the criteria and tables set forth in section 4453 and section 4658. (*Brodie, supra,* 40 Cal.4th at pp. 1321-1322.)

4. *The Schedule Prior to January 1, 2005*.

Under former section 4660, the administrative director for the Division of Workers' Compensation (formerly the Division of Industrial Accidents) of the Department of Industrial Relations was required to prepare, adopt and amend "a schedule for the determination of the percentage of permanent disabilities" in accordance with the statute. (Former § 4660(b); *Glass v. Workers' Comp. Appeals Bd.* (1980 105 Cal.App.3d 297, 302-303 (*Glass*) (finding of permanent disability not substantial evidence unless based on all factors of disability reported by physician).) While not defining permanent disability, former section 4660(a) required the percentages to be based on "the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market." The schedule was and still is "prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule", which may be supplemented or rebutted. (Former § 4660(b); § 4660(c); *Glass, supra,* 105 Cal.App.3d at pp. 302, 307.)

The most recent schedule prior to January 1, 2005, was adopted by the administrative director and effective for injuries on and after April 1, 1997.[7] Section 1 of the 1997 schedule, pages 1-2 to 1-14, contains instructions for rating or determining the percentage of permanent disability. The instructions on pages 1-2 to 1-4 include that reports by physicians indicating permanent impairment or work capacity limitations or restrictions based on objective or subjective findings, or that the injured worker is unable or should not perform certain activities, may be assigned a permanent disability standard

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[7] See the April 1997 Schedule For Rating Permanent Disabilities of which judicial notice is taken under Evidence Code section 450 et seq.

rating or percentage under the schedule. Section 2 of the 1997 schedule refers to "Disabilities and Standard Ratings" for various body parts or functions. Measurement of neck and back disability is addressed on pages 2-13 to 2-15 of section 2,[8] and a certain standard rating or percentage applies depending on whether the impaired function is slight, moderate, or severe. Also included on pages 2-13 to 2-15 of the 1997 schedule are "Spine and Torso Guidelines," which provide a range of standard ratings or percentages for work capacity limitations or restrictions based on the ability to perform or the loss of pre-injury capacity to do certain physical activities. (See also *Glass, supra*, 105 Cal.App.3d at pp. 302-303.) According to pages 2-14 to 2-15, footnotes 1-5, work capacity limitations or restrictions, objective or subjective factors, or measurements of pain may be separated or combined in determining neck and back permanent disability standard ratings or percentages.

In addition, the instructions on pages 1-12 to 1-13 of the 1997 schedule expressly provide for determining the standard rating or percentage of unscheduled disabilities since it is impossible to include all disabilities. (*Glass, supra*, 105 Cal.App.3d at pp. 306-309 (unscheduled limitation to light work for head and nervous system injury must be included in permanent disability rating).) The standard rating or percentage of permanent disability for an unscheduled disability is determined by comparison or analogy to a scheduled disability. (*Glass, supra*, 105 Cal.App.3d at pp. 306-308; *Department of Motor Vehicles v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 1039, 1044-1046 (substantial evidence did not support rating of unscheduled work restriction of no emotional stress or strain due to stomach condition).) Once the standard rating or percentage of permanent disability is obtained, it is adjusted for occupation and age.[9]

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[8] As noted by the WCJ, the 1997 schedule provides on page 2-13, footnote 31, that, "The degree of disability following injury to the spinal or pelvic regions is measured principally by the effects of limitations of motions in all directions, weakness, pain, tenderness, limited endurance, and such concomitant factors as genitor-urinary symptoms, spinal cord pressure symptoms, deformity, impairment of gait, etc."

[9] See 1997 schedule, pages 1-5 to 1-6 and sections 3-6 and former section 4660(a).

5. *The Schedule Effective January 1, 2005*.

On April 19, 2004, the Legislature enacted Senate Bill 899 and comprehensive reform of the workers' compensation system to alleviate the crisis due to skyrocketing costs. (*Brodie, supra*, 40 Cal.4th at pp. 1323, 1329-1330.) As part of the reform package, the Legislature amended section 4660 and the administrative director implemented changes to the schedule as required effective January 1, 2005.[10] (§ 4660(e); *Genlyte*, *supra*, 158 Cal.App.4th at pp. 715-716.) In determining the percentages of permanent disability under amended section 4660(a),[11] consideration is given to the "employee's diminished future earning capacity" and the "nature of the physical injury or disfigurement" incorporates "the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)." (§ 4660(a); § (4660(b)(1) & (2); *Genlyte*, *supra*, 158 Cal.App.4th at pp. 715-716.)

Under section 1 of the 2005 schedule, the instructions indicate that the permanent disability rating or percentage is based on an evaluating physician's impairment rating for each body part and whole person impairment rating or impairment standard in accordance with the 5th edition of the AMA Guides. According to the 5th edition of the AMA Guides, chapter one, page 4, impairment ratings or percentages are consensus estimates that indicate severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living,[12]

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10 Judicial notice is taken of the January 2005 Schedule For Rating Permanent Disabilities under Evidence Code section 450 et seq.

11 Section 4660(a) states: "In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity."

12 Table 1-2 on page 4 of the 5th edition of the AMA Guides provides that activities of daily living include self-care, personal hygiene (urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating), communication (writing, typing, seeing,

excluding work. The impairment ratings also reflect functional limitations and not disability. Whole person impairment ratings or percentages estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work. According to section 1 of the 2005 schedule, pages 1-3 to 1-10, the whole person impairment rating or impairment standard is adjusted for diminished future earning capacity (section 2), occupation (sections 3-5) and age (section 6).

The 2005 schedule also allows for unscheduled impairment standards. Based on page 11 of the AMA Guides, the 2005 schedule on page 1-4 provides that, "[P]hysicians should use clinical judgment, comparing measurable impairment resulting from the unlisted objective medical condition to measurable impairment resulting from similar objective medical conditions with similar impairment of function in performing activities of daily living."

6. *The Applicable Schedule Under Section 4660(d)*.

"The Legislature specifically provided the new schedule, which became effective January 1, 2005, applies prospectively (§ 4660(d)) and defines 'prospectively' to include any worker whose permanent disability results from compensable injuries received or occurring on or after January 1, 2005, as well as workers whose compensable claims arose before January 1, 2005, 'when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.'" (§ 4660(d); *Genlyte, supra*, 158 Cal.App.4th at p. 716.)

Therefore, the Legislature provided that "the percentage of permanent disability will be calculated using the earlier schedule that was in effect on the date of the injury" when before January 1, 2005, there has been either (1) a comprehensive medical-legal

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hearing, speaking), physical activity (standing, sitting, reclining, walking, climbing stairs), sensory function (hearing, seeing, tactile feeling, tasting, smelling), non-specialized hand activities (grasping, lifting, tactile discrimination), travel (riding, driving, flying), sexual function (orgasm, ejaculation, lubrication, erection), and sleep (restful, nocturnal sleep pattern).

report "indicating the existence of permanent disability" (2) a report by a treating physician "indicating the existence of permanent disability" or (3) the employer is required to provide the notice under section 4061 to the injured worker. (*Genlyte, supra,* 158 Cal.App.4th at p. 716, citing *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 148, 152; *Energetic Painting & Drywall, Inc. v. Workers' Comp. Appeals Bd.* (2007) 153 Cal.App.4th 750, 633, 636; *Chang v. Workers' Comp. Appeals Bd.* (2007) 153 Cal.App.4th 750, 753 (schedule effective Jan. 1, 2005, applies to pending matters regardless of date of injury unless exception under § 4660(d) applies).)

The WCAB determined that the WCJ mistakenly applied the 1997 schedule based solely on diagnostic reports, and the 2005 schedule applies because there is no comprehensive medical-legal or treating physician's report "indicating the existence of permanent disability" prior to January 1, 2005. The notice under section 4061 is not an issue in this case. In many cases, application of the 2005 schedule reduces the permanent disability percentage and compensation paid the injured worker. (*Genlyte*, *supra*, 158 Cal.App.4th at pp. 715-716.) We must determine whether the WCAB's findings are based on substantial evidence considering the entire record. (*Braewood, supra*, 34 Cal.3d at p. 164; *Garza*, *supra*, 3 Cal.3d at p. 317; *LeVesque, supra*, 1 Cal.3d at pp. 637-638**;** *Zenith, supra*, 159 Cal.App.4th at pp. 494-496.)

7. *The WCAB's Findings Are Not Based On Substantial Evidence*.

While the WCJ relied on cervical fusion, limited range of cervical motion and whole person impairment in the diagnostic reports as "indicating the existence of permanent disability" under section 4660(d), the WCJ also found that Dr. Schiffman's 2004 treating physician's reports incorporated the diagnostic reports. The District contends that reliance by the WCJ and Snedecor solely on diagnostic reports would be an exception to section 4660(d).

a. ***The WCAB's determination that the WCJ relied solely on diagnostic reports to find indication of the existence of permanent disability under section 4660(d) is not supported by substantial evidence*****.**

In its decision, the WCAB explained that the WCJ was not authorized to find indication of the existence of permanent disability from diagnostic reports absent medical opinion in a comprehensive medical-legal or treating physician's report. However, the WCJ pointed out in the report on reconsideration that 2004 treating physician's reports by Dr. Schiffman incorporated diagnostic reports, which is supported by the record. Dr. Schiffman's report of September 30, 2004, refers to the computer range of motion testing reported on the same date by Dr. Schiffman's medical group. Reports by the primary treating physician are required to incorporate findings or reports by secondary physicians under section 4061.5.[13] Since the record supports the WCJ's finding that 2004 treating physician's reports by Dr. Schiffman incorporated diagnostic reports, the WCAB's determination that the WCJ relied solely on diagnostic reports to find indication of the existence of permanent disability under section 4660(d) is not supported by substantial evidence.

b. ***The WCAB did not address whether cervical fusion, limited range of motion and whole person impairment reported in 2004 indicated the existence of permanent disability under section 4660(d)*****.**

The WCJ also found that cervical fusion, limited range of cervical motion and whole person impairment reported in the diagnostic reports and incorporated into Dr. Schiffman's 2004 reports indicated the existence of permanent disability under section

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13 Section 4061.5 provides in part: "In the event that there is more than one treating physician, a single report shall be prepared by the physician primarily responsible for managing the injured worker's care that incorporates the findings of the various treating physicians."

See also California Code of Regulations, title 8, section 9785(e)(4), which states: "The primary treating physician shall be responsible for obtaining all of the reports of secondary physicians and shall, unless good cause is shown, within 20 days of receipt of each report incorporate, or comment upon, the findings and opinions of the other physicians in the primary treating physician's report and submit all of the reports to the claims administrator."

4660(d), and the 1997 schedule applies. Snedecor argues that the WCAB similarly applied the 1997 schedule based on permanent disability indicated by whole person impairment due to surgical hip replacement in *Rosas School District v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1312.[14] The District argues that whole person impairment under the AMA Guides pertains only to the 2005 schedule. Whether cervical fusion, limited range of motion and whole person impairment under the AMA Guides indicates the existence of permanent disability under the 1997 schedule and section 4660(d) was not addressed by the WCAB.

Our analysis of the 1997 and 2005 schedules set forth in this opinion indicates that the WCJ may be correct. The 1997 schedule provides that spinal permanent disability may be based on such factors as permanent impairment, limitation of motion or impaired function. Permanent disability under the 2005 schedule is based on impairment of the body part and whole person impairment in performing activities of daily living according to the 5th edition of the AMA Guides. Impairment under the AMA Guides also reflects functional limitation. Both schedules allow for determining unscheduled disabilities by comparison or analogy to scheduled disabilities. In serious injury cases, permanent disability may exist even though the injured worker is still temporarily totally disabled and not permanent and stationary under *Genlyte*, *Zenith* and *Lewis*.

In 2004, Snedecor had cervical fusion at two levels with internal fixation of an anterior plate, limited range of cervical motion and whole person impairment under the AMA Guides that was reported in diagnostic reports and incorporated into treating physician's reports by Dr. Schiffman. The limited range of motion and whole person impairment due to the cervical fusion under the AMA Guides may be equal, compared or analogized to permanent impairment, limitation of motion, impaired function or other

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14 While writ denied cases reported in California Compensation Cases are not binding on courts of review, the cases are citable authority for the contemporaneous interpretation and application of workers' compensation law by the WCAB. (*Smith v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 530, 537, fn. 2, citing *Ralphs Grocery Co., supra*, 38 Cal.App.4th at page 827, fn. 7.)

factors indicating the existence of permanent disability under the 1997 schedule. We also note that the WCJ found the difference between the 4th and 5th editions of the AMA Guides to be insignificant in this case, and the difference was not addressed by the WCAB or raised by the District. Therefore, 2004 treating physician's reports by Dr. Schiffman may indicate the existence of permanent disability under the 1997 schedule and section 4660(d).

However, finding that the WCJ relied solely on diagnostic reports, the WCAB did not address whether cervical fusion, limited range of motion and whole person impairment under the AMA Guides may be equal, compared or analogized to factors indicating the existence of spinal permanent disability under the 1997 schedule and section 4660(d). Since the WCAB did not reach this issue and has extensive expertise and experience in such highly technical matters of workers' compensation, we conclude that the WCAB should determine the issue on remand. (See *Brodie, supra*, 40 Cal.4th at p. 1331; *Zenith, supra,* 159 Cal.App.4th at p. 499; *Genlyte, supra,* 158 Cal.App.4th at p. 724.)

8. *Eligibility For Vocational Rehabilitation May Also Indicate The Existence of Permanent Disability*.

Recommendation of vocational rehabilitation even before a permanent and stationary status is achieved may indicate the existence of permanent disability under section 4660(d). (*Genlyte, supra,* 158 Cal.App.4th at p. 722.) In this case, the WCJ reported that the District provided a notice of potential eligibility for vocational rehabilitation in a letter sent on December 20, 2004. The WCJ also reported that the letter indicated an offer of vocational rehabilitation and the existence of permanent disability under section 4660(d) because a change of occupation was a 20 standard rating under the 1997 schedule. In its opinion, the WCAB rejected the WCJ's reasoning because the District's notice was triggered by the requisite period of time Snedecor was out of work and not by a medical opinion that he was a qualified injured worker.

We note that former section 4636(c) established a rebuttable presumption of "medical eligibility" for vocational rehabilitation where aggregate temporary total disability exceeds 365 days and "the employee has not been previously identified as medically eligible for vocational rehabilitation."[15] "Medical eligibility," which was part of the definition of "qualified injured worker" under former section 4635(a),[16] meant that expected permanent disability precluded or was likely to preclude the injured employee from engaging in his or her usual and customary occupation or job duties at the time of injury. The WCAB did not explain how the presumption of "medical eligibility" and expected permanent disability was rebutted by Snedecor not being identified as a "qualified injured worker" by medical opinion, when former section 4636(c) provided that the presumption may apply even though "the employee has not been previously identified as medically eligible for vocational rehabilitation."[17] However, we need not decide the issue because the District's December 20, 2004, letter was not part of the record received from the WCAB.

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[15] Former section 4636(c) provided: "When aggregate total disability exceeds 365 days and the employee has not been previously identified as medically eligible for vocational rehabilitation, there shall be a rebuttable presumption that the employee is medically eligible for vocational rehabilitation services."

[16] Former section 4635 (a) provided in part: "'Qualified injured worker' means an employee who meets both of the following requirements: [¶] (1) The employee's expected permanent disability as a result of the injury, whether or not combined with the effects of a prior injury or disability, if any, permanently precludes, or is likely to preclude, the employee from engaging in his or her usual occupation or the position in which he or she was engaged at the time of injury, hereafter referred to as 'medical eligibility.'"

[17] We realize that former sections 4635 and 4636, and former section 139.5 which authorized vocational rehabilitation, have been repealed. However, the WCAB apparently applied these statutes for the limited purpose of determining whether the District's 2004 notice of potential eligibility for vocational rehabilitation indicated the existence of permanent disability under section 4660(d). (See *Godinez v. Buffets, Inc.* (2004) 69 Cal.Comp.Cases 1311 (WCAB applied former § 4645 to find appeal of Rehabilitation Unit determination timely filed within 20 days since former § 139.5(c) under Senate Bill 899 expressly permitted consideration of former §§ 4642 and 4644).)

DISPOSITION

The decision of the WCAB is annulled and the matter is remanded to determine whether the 1997 or 2005 schedule applies and for further proceedings not inconsistent with this opinion. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

FERNS, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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* Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VII, section 6 of the California Constitution.